BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALEJANDRO MENDOZA	)	
Claimant	)	
	)	
VS.	)	
	)	
DCS SANITATION	)	
Respondent	)	Docket No. 1,008,559
	)	
AND	)	
	)	
ZURICH U.S. INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the October 28, 2003 preliminary hearing Order For Medical Treatment entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

The claimant had gone to respondent's office to pick up his paycheck and he suffered injury in a slip and fall on the sidewalk outside the office. The Administrative Law Judge (ALJ) found the claimant's accidental injury arose out of and in the course of employment and therefore ordered respondent to pay for claimant's medical treatment.

The respondent and its insurance carrier request review and argue that pursuant to K.S.A. 44-508(f) the claimant's accidental injury did not arise out of and in the course of employment. Respondent and its insurance carrier further argue that none of the exceptions to the "going and coming" are applicable to the stipulated facts regarding claimant's slip and fall.

Conversely, claimant argues that because he assisted respondent's secretary by carrying a briefcase that contained the paychecks to be distributed that day, his actions benefited the employer. Consequently, claimant argues that although he was not performing his usual job duties, nonetheless, he was performing an activity that benefited his employer and the injury suffered in the slip and fall should be compensable. Accordingly, claimant requests the Board to affirm the ALJ's Order For Medical Treatment.

The sole issue raised on review is whether claimant suffered accidental injury arising out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

At the preliminary hearing on October 10, 2003, the claimant did not testify. Instead the parties provided the Judge a recitation of the stipulated facts regarding claimant's slip and fall accident.

Respondent is described as a company that performs clean up at a packing plant. Claimant performs his job duties for respondent at the packing plant. However, claimant and respondent's other employees do not receive their paychecks at the packing plant. Instead, respondent's employees can pick up their paychecks for the preceding week at their option on either Thursday or Friday at respondent's office located at 375 East Pancake in Liberal, Kansas.

Respondent's office is in a building that contains three other businesses. There is a parking lot adjacent to the building that is available for the customers of all the businesses located within the building as well as a restaurant on the other side of the parking lot.

On December 5, 2002, at approximately 7:45 a.m., the claimant parked in the parking lot and started to walk to respondent's office to pick up his paycheck. It was raining or snowing and ice was building up on the sidewalk in front of respondent's office. Respondent's secretary was also heading toward the office and she asked claimant to carry the briefcase which contained the paychecks. It was not part of claimant's job duties to carry the briefcase but claimant agreed and took the briefcase. As claimant approached the respondent's office he slipped and fell outside on the sidewalk in front of the door to respondent's office. The claimant broke his ankle.

The determination of whether claimant suffered a compensable injury requires an analysis of whether he slipped and fell while in his employer's service or while going to or coming from his employment. The "going and coming" rule contained in K.S.A. 2002 Supp. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on

> the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2002 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[1] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[2]

But K.S.A. 2002 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[3] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[4]

The Kansas Appellate Courts have also provided exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[5]

It is undisputed claimant was going to respondent's office to pick up his paycheck. The claimant does not argue that the injuries were the proximate cause of the employer's negligence. It is further undisputed that claimant had not entered the premises of the employer. Consequently, the premises exception to the "going and coming" rule is not

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[1] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[2] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, at 46, 883 P.2d 768 (1994).

[3] Id. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[4] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[5] *Messenger v. Sage Drilling Co.*, 9 Kan. App.2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

applicable. Moreover, the parking lot and sidewalk were not under the exclusive control of the respondent. While the parking lot was utilized by respondent's employees and customers, there is no evidence to show that it was exclusively used and/or controlled by only respondent's employees and customers. The parking lot and sidewalk were regularly utilized by members of the general public in dealing with all the businesses located in the building which contained respondent's office.

And the route from the parking lot to respondent's office did not involve a special risk or hazard nor was it a route only utilized by the public to deal with respondent. As previously noted, the public used the parking lot and adjacent sidewalks in dealings with all the businesses located in the building where respondent leased office space. On the way from the parking lot to the respondent's office the claimant was subjected to the same risks or hazards to which the general public is subjected.

Claimant argues that his accident arose out of and in the course of his employment because he was in the process of carrying the briefcase containing the paychecks into the office for the benefit of his employer. Respondent argues that carrying the briefcase was not a part of claimant's job. In this case, claimant's carrying the briefcase was a convenience for respondent's secretary. Respondent further argues that because claimant was on his regular route to pick up his paycheck when the accident occurred, the trip was not for a business purpose. The presence of the briefcase did not affect claimant's route, nor did it transform his travel from "going and coming" to a business purpose.

The test for determining whether an injury arose "out of" employment excludes any injury that is not fairly traceable to the employment and not coming from a hazard to which the worker would have been equally exposed apart from the employment.[6] In this case, claimant would have been traveling the same route regardless of whether he was carrying the briefcase and, thus, would have been equally exposed to the danger of walking on icy sidewalks. The employment did not expose the claimant to an increased risk of injury of the type actually sustained.[7] Accordingly, the Board finds the claimant's accident did not arise "out of" nor "in the course of" his employment with the respondent.

In the instant case, the claimant had not yet arrived at his employer's premises and the Board finds no special risk or hazard exists to overcome the limitations of K.S.A. 2002 Supp. 44-508(f). The Board finds claimant did not suffer personal injury by accident arising out of and in the course of his employment and the ALJ's Order should be reversed.

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[6] *Newman v. Bennett*, 212 Kan. 562, 567, 512 P.2d 497 (1973).

[7] *Angleton v. Starkan, Inc.*, 250 Kan. 711, Syl. ¶ 7, 828 P.2d 933 (1992).

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated October 28, 2003, should be and hereby is reversed and claimant is denied benefits for the injury on December 5, 2002.

IT IS SO ORDERED.

Dated this _____ day of December 2003.

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
James M. McVay, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director